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## **Preliminary Report of the ILA Study Group on Content and Evolution of the Rules of Interpretation (Johannesburg, 7-11 August 2016)**

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**ILA STUDY GROUP ON  
THE CONTENT AND EVOLUTION OF THE RULES OF INTERPRETATION**

**PRELIMINARY REPORT – 7-11 AUGUST, JOHANNESBURG 2016**

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## I. MANDATE OF THE STUDY GROUP

According to McNair, interpretation is a topic that is approached with the greatest of trepidation,<sup>1</sup> which it is perhaps why it has never formed in and of itself a topic of study of the *Institut de Droit International*, the International Law Association (ILA), or the International Law Commission (ILC). It is always raised in connection with another topic which forms the basis of analysis. Yet, despite the fact that one would be hard pressed to find an international case in which no issue of interpretation has been raised, and that myriad articles and books are written each year on the topic, interpretation still raises complex and unresolved issues.

The present Study Group aims to fill this lacuna. It aims to put the rules of interpretation in the spotlight and research relatively unexplored areas regarding their scope and application. The Study Group will aim for completion of its work by 2018.

Six areas of research were identified as the most apposite for producing meaningful results. These issues were outlined in a document prepared by the *Rapporteurs*,<sup>2</sup> and were the following (hereinafter referred to as topics 1 to 6):

1. Evolution of the Rules of Interpretation
2. Content of the Vienna Convention of the Law of Treaties (VCLT) & Customary Rules of Interpretation: Elements in Need of Clarification & Points of Divergence
3. The Rules of Interpretation Across Regimes
4. Interpretation of Customary International Law
5. Interpretation of Unilateral Acts and Declarations
6. Interpretation of Acts/Secondary Instruments of International Organisations.

These points will be elaborated below in the relevant sections of this Report.

## II. THE ROAD SO FAR

The ILA Study Group on Content and Evolution of the Rules of Interpretation was established in May 2015, upon approval by the Executive Council of the ILA. The Study Group held its inaugural meeting on 13-14 May 2016 in Athens, with the generous financial contribution of the *Athens Public International Law Center (AthensPIL)* and *PluriCourts - Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order*. It took place at the premises of the European Public Law Organization (EPLO). The following members participated in the meeting: Professor Photini Pazartzis, Professor Geir Ulfstein, Dr. Panos Merkouris, Dr. Daniel Peat, Dr. Eirik Bjorge, Professor Andreas

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<sup>1</sup> Arnold D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), at 364.

<sup>2</sup> Hereinafter referred to as the 'ILA Study Group Road Map'.

Føllesdal, Dr. Andreas Kulick, Professor Albrecht Weber.<sup>3</sup> The other members of the Study Group offered in advance thoughts and comments on the topics in discussion.

During the Study Group's inaugural meeting, the *ILA Study Group Road Map* was presented and discussed. The members present showed particular interest in certain topics, but it was decided that finalisation of the work agenda of the Study Group should occur after the input of all members of the Study Group and other ILA members at Johannesburg. This Preliminary Report summarises the proposals made in the *Road Map* and the comments of members made at the first meeting of the Study Group in Athens or *in absentia*.

### III. RESEARCH POINTS IDENTIFIED IN THE ROAD MAP

#### 1. *Evolution of the Rules of Interpretation*

##### i. 'Rules'

One of the first topics of discussion during the first meeting of the Study Group was the use of the term 'rules' in the title of the Study Group. The principal issue discussed was whether the Study Group should take a position on whether the 'rules' of interpretation are in fact rules, or rather whether they are 'principles', 'maxims', 'canons' or the such. Despite different views as to the nature of the 'rules' of interpretation, there was consensus that such a theoretical enquiry was not fruitful at this stage in the project and that, for pragmatic reasons, it would be best to remain 'agnostic' on the matter and use the term 'rules' until the project had progressed.

##### ii. 'Evolution'

Despite the existence of extensive literature surrounding the role and content of the rules of interpretation of treaties, very little attention has been given to the potentially evolving nature of these rules. International courts and tribunals pay lip service to the customary nature of the rules of interpretation,<sup>4</sup> yet they approach the rules as if they are frozen in time with a clearly defined and unchangeable content. This is somewhat surprising considering that, with respect to treaties, considerations of time and change frequently factor into judicial and academic writing, such as the tug-of-war between the principle of contemporaneity and dynamic/evolutive interpretation. A similar process has not been examined with respect to the rules of interpretation themselves. This *lacuna* becomes even more critical since international courts and tribunals often have to interpret

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<sup>3</sup> In this context, the authors of this preliminary report would like to thank the research fellows and junior researchers of the *Athens PIL* who took upon themselves the laborious task of keeping the minutes of this meeting: Dr. Nikolaos Voulgaris, Mr. Orfeas Chasapis Tassinis, and Ms. Aikaterini Pitsoli.

<sup>4</sup> *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, [1999] *ICJ Rep.* 1045, para. 18; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 February 1994, [1994] *ICJ Rep.* 6, para. 41; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment on Preliminary Objections of 12 December 1996, [1996] *ICJ Rep.* 803, para. 23

19<sup>th</sup> and early 20<sup>th</sup> century treaties.<sup>5</sup> In doing so they apply the customary rules of interpretation as enshrined in Article 31-33 VCLT. This, however, may raise concerns as to the conformity of this practice with the principle of non-retroactivity,<sup>6</sup> as pointed out in academic writing.<sup>7</sup>

A number of questions could fall within this area of research, such as:

- can the rules of interpretation evolve through time, and have they done so?
- what are the critical changes that have occurred through time?
- when interpreting a pre-VCLT treaty (or a treaty where a non-VCLT party is involved), which rules of interpretation are applicable – the rules at the time of the conclusion of the treaty or the rules at the time of the interpretation of the treaty?

The members of the Study Group agreed that this was an interesting topic. Members debated the use of the term ‘evolution’. Some members considered that the term ‘evolution’ had inherent connotations related to the nature of the ‘rules’.<sup>8</sup> Others noted that the ‘evolution’ of the rules of interpretation could also be seen as a matter of divergent ‘practice’ in the interpretation and application of the rules. Finally, others felt that the term ‘evolution’ was an apt description as it ‘will produce different species of interpretation filling different ecological niches’. Bearing in mind the position of the Study Group to remain ‘agnostic’ as to the nature of the ‘rules of interpretation’, it was felt that the term ‘evolution’ could be retained as a working term for the time being. Discussion on its appropriateness could be revisited once the work of the Study Group had progressed and produced concrete results that would allow it to take a position on the matter.

The ideal structure for this topic of research, as proposed by the Co-Chairs, was to split it into two eras: pre-VCLT and post-VCLT. The former could function as a historical introduction to the body of the research of the Study Group. The post-VCLT research could be integrated into other topics of the *Road Map*, notably topics 2 and 3. All members were in agreement that this was the optimal course of action.

## ***2. Content of the VCLT & Customary Rules of Interpretation: Elements in Need of Clarification & Points of Divergence***

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<sup>5</sup> See for instance: *Kasikili/Sedudu Island* (n4); *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), Judgment of 17 December 2002, [2002] *ICJ Rep.* 625.

<sup>6</sup> *Kasikili/Sedudu Island* (n4) Declaration of Judge Oda, para. 4.

<sup>7</sup> H. Fox, ‘Article 31(3)(a) and (b) of the Vienna Convention and the *Kasikili/Sedudu Island* Case,’ in: M. Fitzmaurice *et al* (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010), 59; P. Tavernier, ‘Observations sur le droit intertemporal dans l’affaire de l’île de Kasikili/Sedudu (Botswana/Namibie)’ (2000) 104 *RGDIP* 429; P. Merkouris, ‘(Inter)Temporal Considerations in the Interpretative Process of the VCLT: Do Treaties Endure, Perdure or Exdure?’ (2014) 45 *NYIL* 121; U. Linderfalk, ‘The Application of International Legal Norms Over Time: the Second Branch of Intertemporal Law’ (2011) 58/2 *NILR* 147.

<sup>8</sup> See previous discussion on ‘rules’, ‘principles’ or ‘maxims’.

There has never been a shortage of publications regarding the content of the rule of interpretation as enshrined in Articles 31-33 VCLT. Despite this, to argue that there is nothing further to be clarified with respect to these rules would be far removed from reality. The ILC, for instance, is currently examining the topic ‘Treaties over Time / Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation’.<sup>9</sup> To attempt an exhaustive examination of all ‘grey’ areas of treaty interpretation would be an exercise in futility. In the *ILA Study Group Road Map*, the authors suggested that this topic could be divided into several sections, such as:

- examining whether various principles of interpretation,<sup>10</sup> such as the principle of effective interpretation, fit within Articles 31-33 VCLT (e.g. 31(3)(c) or 32 VCLT), or whether they are separate rules of customary international law;
- examining whether the VCLT rules of interpretation and their customary law counterparts have identical content or whether there are points of divergence;
- examining what approaches/solutions have been adopted when textual interpretation conflicts with an interpretation based on the object and purpose of a treaty, or conflicts with the intention of the parties or the preparatory work (as well as any other permutation of these interpretations); and
- whether the structure of Articles 31 and 32 of the VCLT reflects the practice and *opinio juris* of states.

Despite the undeniable utility of this topic, the members of the Study Group were in agreement that three points should be borne in mind.

- Firstly, the members noted that the exact areas of interest of this topic must be clearly delineated prior to inclusion in the Study Group’s research agenda.
- Second, instead of focusing on this as a separate point of research, the members felt that it would benefit the Study Group’s work if the aforementioned questions were subsumed in the research to be conducted in the context of topics 1 and 3, i.e. pre-VCLT historical research and regime-specific and cross-regime interpretative methods respectively.
- Finally, all the members noted the importance of ensuring the originality of the research and avoiding replication of existing analysis.

### ***3. Evolution of the Rules of Interpretation***

Recent work, both within the ILC and the academy, has addressed the topic of treaty interpretation over time.<sup>11</sup> This topic raises myriad questions of interest: why, for example,

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<sup>9</sup> G. Nolte, ‘First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation’, (19 March 2013) UN Doc A/CN.4/660; see also the second and third reports: (26 March 2014) UN Doc A/CN.4/671; (7 April 2015) UN Doc A/CN.4/683 respectively.

<sup>10</sup> Other principles that fit within this category include *in pari materia* interpretation and *ejusdem generis*, to name but a few.

is evolutionary interpretation adopted in relation to some treaties but not others? How might this be justified within the rubric of Articles 31 and 32 of the Vienna Convention? Most importantly, ‘faced with the familiar paradox of accounting for difference under the sign of equality, the question of the day is how to *explain* such differential treatment within the law of treaties. What justifies weighing some rules of interpretation more strongly than others (*i.e.* emphasizing object and purpose over text, or vice versa)?’<sup>12</sup>

Whilst evolutive interpretation has been the object of sustained academic commentary in recent times, the broader question of how and why different international legal regimes interpret in different ways has not been subject to the same scrutiny.<sup>13</sup> Interpretation by the Appellate Body of the WTO, for example, is frequently characterised as textualist, whilst that of the European Court of Human Rights is generally seen as teleological. One fruitful avenue for enquiry could be to examine not only how interpretive approaches differ across legal regimes, but also why this occurs. Moreover, if such difference is not only rife, but also inevitable, do the provisions of the Vienna Convention actually tell us anything about how international law is, or should be, interpreted? If we acknowledge that their utility is limited, how are we then to approach the assessment of interpretation?

This proposal was well received by both those present at the Athens conference and those that had submitted comments *in absentia*, with many suggesting that this topic seemed to be the most promising avenue of research for the Study Group. The members present particularly noted that it could be a useful framework within which to also address topics one and two.

The main point of discussion in relation to the third topic was how to define the regimes that the Study Group could compare. Members considered that division by substantive treaty regime was the best approach to take, focusing predominantly – for reasons of practicality – on the practice of judicial bodies. Should the practice of other interpreters (States, international organizations, etc.) be readily available, it was agreed that these too should be examined. Specific regimes that members noted would be of interest include: the law of the sea, international trade law, human rights (national, regional, and international bodies), international investment law, international criminal law, international humanitarian law, environmental law, boundary disputes, international organizations law, and the law of the European Union. Members understood that this list would have to be narrowed down as the work of the Study Group progressed, but that the final selection of

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<sup>11</sup> See for example, E. Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014); C. Djeflal, *Static and Evolutionary Treaty Interpretation: A Functional Reconstruction* (CUP 2015); G. Nolte (ed.), *Treaties and Subsequent Practice* (OUP 2013); and the work of the International Law Commission on ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’.

<sup>12</sup> J. Arato, ‘Accounting for Difference in Treaty Interpretation Over Time’, in A. Bianchi, D. Peat, & M. Windsor, *Interpretation in International Law* (OUP 2015) 206.

<sup>13</sup> As pointed out by one member of the Study Group present in Athens, a notable exception is the symposium published in the *Revue Générale de Droit International Public* (2011, No. 2).



case studies was something that could be made with the input of the full membership at the Johannesburg meeting.

#### 4. *Interpretation of Customary International Law*

From the early writings of Grotius, Vattel and Pufendorf interpretation has always been at the epicentre of academic research and case-law. However, analysis of interpretation has focused mainly on treaties and ignored customary international law. The question that arises, then, is whether rules of customary international law can also be subject to interpretation. This issue has not been the subject of any extensive analysis. In fact, the current work of the ILC, although undoubtedly critical in the discourse surrounding the process of formation of customary international law, focuses on the two elements of customary law: *practice* and *opinio juris*.<sup>14</sup>

This leaves an entire stage in the ‘life-cycle’ of customary international law completely unexplored. Once a customary rule has emerged, and when it is considered for application within a particular case, should it not be open to interpretation similar to any treaty rule? The issue has been debated in academic discourse.<sup>15</sup> It is interesting to note, however, that even in the discussions in the Advisory Committee of Jurists, responsible for drafting the PCIJ Statute, the members clearly acknowledged the interpretability of customary international law.<sup>16</sup> Similarly, Art. 21(2) of the Rome Statute provides that ‘[t]he Court may *apply principles and rules of law as interpreted* in its previous decision’,<sup>17</sup> although a member of the Study Group raised the point that this perhaps is not an acknowledgement of the interpretability of customary international law but rather a linguistic expression without any underlying connotations as to the issue at hand.

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<sup>14</sup> M. Wood, ‘First Report on Formation and Evidence of Customary International Law’ (17 May 2013) UN Doc A/CN.4/663; see also the second and third reports: (22 May 2014) UN Doc A/CN.4/672; (27 March 2015) UN Doc A/CN.4/682 respectively.

<sup>15</sup> In favour: R. Kolb, *Interprétation et création du droit international: esquisses d’une herméneutique juridique moderne pour le droit international public* (Bruylant 2006), 219; D. Alland, ‘L’interprétation du droit international public’ (2014) 362 RdC 41, 82-8; P. Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* (Martinus Nijhoff 2015), Chapter 4; A. Bleckmann, ‘Zur Feststellung und Auslegung von Völkergewohnheitsrecht’, (1977) 37 ZaöRV 504. Against: M. Bos, *A Methodology of International Law* (North-Holland 1984), 109; R. Bernhardt, ‘Interpretation in International Law’, in: R. Bernhardt and R. L. Bindschedler (eds.), *Encyclopedia of Public International Law*, Vol. II (North-Holland 1992), 1417; T. Treves, ‘Customary International Law’, MPEPIL 1393 (November 2006), para. 2, available at: <www.mpepil.com> (last accessed on 15 July 2016). The issue has also been raised indirectly from a methodological angle, in: S. Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26/2 EJIL 417; S. Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26/2 EJIL 417.

<sup>16</sup> Advisory Committee of Jurists, *Procès Verbaux of the Meetings of the Advisory Committee of Jurists* (1920), 275 (emphasis added).

<sup>17</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art. 21(2) and (3). Emphasis added.

In addition to the above, *dicta* on the interpretability of customary international law seem to be contained in several landmark cases.<sup>18</sup> Perhaps the most express recognition of the interpretability of customary international law can be found in Judge Tanaka's Dissenting Opinion in *North Sea Continental Shelf*, where in no uncertain terms he opined that '[c]ustomary law, being vague and containing gaps compared with written law, requires precision and completion about its content. This task, in its nature being interpretative, would be incumbent upon the Court. *The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law*'.<sup>19</sup>

Most members of the Study Group agreed that this was a fascinating topic that raised many questions, such as how interpretation of customary law differs from treaty interpretation, whether there is enough evidence on which to base a clear set of rules/principles of interpretation of customary law, and where formation of customary law ends and interpretation begins.<sup>20</sup> However, the main concern raised by members was that, because of the uncharted waters of this research, if this topic was selected it would monopolise the time and resources of the Study Group to the detriment of the remaining points of research.<sup>21</sup> The time-frame of the Study Group's mandate, i.e. until 2018 seemed too restrictive to tackle this broad topic.

An additional point that needs clarification is why the *Road Map* referred only to the interpretation of customary international law. This was not meant to suggest that general principles as a source of international law are not open to interpretation. It was rather a strategic choice on the part of the authors of the *ILA Study Group Road Map* to propose a topic that was feasible within the Study Group's allotted time-frame. It was considered that it made more sense logically and substantively to tackle first the issue of interpretation of customary international law, before attempting to embark on examining the interpretability of the 'general principles'.

On the basis of the above, the Study Group was of the view that on the one hand the topic merited research, but on the other it was too complex for the limited time and resources of the Study Group. It was decided that the issue should be left on the table,

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<sup>18</sup> Indicatively: *North Sea Continental Shelf (Germany v. Denmark and the Netherlands)*, [1969] ICJ Rep 3, Dissenting Opinion of Judge Tanaka, 181; *Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States of America)*, Judgment of 27 June 1986, [1986] ICJ Rep 14, para. 178; *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO, Panel Report adopted on 21 November 2006, WT/DS291R, WT/DS292R and WT/DS293R, paras. 7.68-7.72.

<sup>19</sup> *North Sea Continental Shelf* (n18), Dissenting Opinion of Judge Tanaka, 181 (emphasis added).

<sup>20</sup> A member of the Study Group was of the view that the 'interpretation' to which the Study Group referred applied only to words, consequently customary international law was not open to interpretation; rather any purported act of interpretation of customary international law is better understood as an act of elaboration, referring to: C.A. Bradley, 'Customary International Law Adjudication as Common Law Adjudication' (SSRN, 9 February 2015), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2559190](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559190) (last accessed on 15 July 2016).

<sup>21</sup> Another issue raised was the fear of ending up with an infinite regression argument. The Co-rapporteur suggested that such concerns were not unique to the interpretation of customary international law but were part and parcel of the entire process of interpretation. In addition, he suggested, that in any event the concept of 'constructive rules' of Anzilotti could offer a theoretical foundation to tackle any such concerns.

awaiting the comments and discussions in Johannesburg, at which time a final decision on its future would be taken. In any event, it was felt that if the Study Group's research was devoted to other areas, a small section in the final report of the Study Group should outline that the importance of the interpretation of customary international law had been identified, but that for practical reasons it may be better suited for future research by another Study Group or Committee.

### ***5. Interpretation of Unilateral Acts and Declarations***

The interpretation of unilateral acts is a topic that has attracted scant attention in the literature. Unilateral acts were the focus of a Working Group of the International Law Commission from 1996 to 2006, which culminated in the adoption of ten 'guiding principles' applicable to unilateral acts,<sup>22</sup> largely focussed on examining when such acts are to be considered as binding.<sup>23</sup> The ILC addressed the interpretation of such acts, notably in Principle 7, which states that "in interpreting the content of such obligations, weight shall be given first to the text of the declaration, together with the context and the circumstances in which it was formulated."<sup>24</sup> The Commentary to this Principle endorses the statement of the ICJ in the *Nuclear Tests* cases, according to which "when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."<sup>25</sup> However, whilst the ILC did touch on the interpretation of unilateral acts, its work was mainly based on a handful of cases before the ICJ; an examination of the treatment of unilateral acts outside of judicial proceedings could yield different conclusions.

Rarely, however, are claims brought against States on the basis that they breached a unilateral statement to be legally bound to a certain course of action. The utility of examining the interpretation of unilateral acts in general is therefore questionable, and is likely to be based on sparse practice if pursued. The Co-Rapporteurs suggested that it may be useful to examine the interpretation of two specific kinds of unilateral acts: optional clause declarations made pursuant to Article 36(2) of the ICJ Statute, and schedules of commitments of WTO members. Both have been referred to in the literature as having a 'hybrid' character – they are unilateral acts that gain legal normativity because of (in the case of optional clause declarations) compliance with a conventional procedure, or (in the case of schedules of commitments) the agreement of other States Parties to the treaty. The main question regarding interpretation in this context is whether it is justifiable to accord more importance to the intention of the 'declaring' State than otherwise would be the case for treaty interpretation. A further line of enquiry might be to examine what reasons exist – if any – to differentiate between interpretation of an optional clause declaration and a

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<sup>22</sup> Yearbook of the International Law Commission, 2006, vol. II, Part Two, 369.

<sup>23</sup> *Nuclear Tests case (Australia v. France; New Zealand v. France)*, [1974] ICJ Rep 457.

<sup>24</sup> Yearbook of the International Law Commission, 2006, vol. II, Part Two, 377.

<sup>25</sup> *Nuclear Tests case* (n23), para. 47.

schedule of commitments, and what this might tell us about the interpretation of unilateral acts more generally.

On the basis of the *Road Map* and presentations by the Rapporteurs, the members present at the Athens meeting noted that this topic was underexplored but generally felt that it was less pressing than the abovementioned topics of treaty interpretation. Some members queried whether acts that were made pursuant to multilateral treaties, such as WTO schedules of commitments, could truly be called unilateral acts. The consensus view was that this topic could not form the focus of the Study Group's work.

## ***6. Interpretation of Acts/Secondary Instruments of International Organisations***

Whilst the interpretation of treaties has remained the main focus of academic study, the proliferation of treaty regimes that endow international organizations and treaty bodies with the power to adopt resolutions, decisions, or recommendations suggests that the interpretation of such secondary instruments is growing in importance. The paradigm example – and the one which has attracted most academic commentary – is of course the interpretation of UN Security Council Resolutions.<sup>26</sup> But this is clearly not the only example: resolutions of the International Maritime Organization, regulations of the International Seabed Authority, as well as resolutions adopted by conferences or meetings of the Parties to multilateral environmental agreements, the internal practice and rules of an organization, all provide illustrative examples of instruments adopted by an international body which may require interpretation. Considering that international activities are regulated to a significant extent by such secondary instruments, one possible avenue of enquiry for the Study Group would be to explore how these instruments are interpreted and if one could formulate any general principles (or customary rules) that regulate their interpretation.

The general presumption has been to approach the interpretation of secondary instruments by analogy to the rules governing the interpretation of treaties, basing interpretation on Articles 31 and 32 of the VCLT.<sup>27</sup> However, this has been quite rightly called into question. For example, is it appropriate to adopt the Vienna Convention's focus on the intention of the Parties when interpreting secondary instruments? How could the mechanical transposition of the rules of treaty interpretation account for the variations in

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<sup>26</sup> M. Wood, 'The Interpretation of Security Council Resolutions', (1998) Max Planck Yearbook of United Nations Law 73.

<sup>27</sup> Wood (n26), 85 *et seq*; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, Advisory Opinion, 1 February 2011, Case No. 17, paras. 57 *et seq*; ICTY, (interpretation of Statute); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para. 95; Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, STL-11-01/I, para 26 *et seq*.

the institutional, procedural, and legal context in which secondary instruments are adopted? Should the interpretation of constitutive instruments (such as the Statute of the ICTY) differ from the interpretation of other instruments?

Whilst expressing interest in this topic, members considered that it was not an appropriate avenue of enquiry for the Study Group. In particular, it was noted that the topic might prove to be too varied and the contextual differences too significant to draw any general conclusions. It was, however, noted by one member that some elements of this topic may be incorporated in research conducted under topic 3.

#### **IV. MISCELLANEOUS**

Various points for consideration were raised orally and in writing by members of the Study Group. Some of these have already been incorporated in the previous Sections, but some defied categorization. For reasons of convenience and in order to assist the discussions in Johannesburg they are reproduced below:

- One member of the Study Group noted that the interpretative authority of various types of commentary on treaties on specialist topics warrants attention. In the view of the Co-Rapporteurs, this could be examined with the context of topic 3;
- The question was raised whether the interpretation of codification treaties should be considered as treaty interpretation or the interpretation of customary international law, or whether there are special rules on the subject. Again, it is suggested that this could be treated under topic 3 and/or 4;
- In relation to topic 3, it was highlighted that the term ‘regime’ needs to be clarified in order to determine the methodology to be used by the Study Group;
- It was suggested that topic 3 should be approached in two stages. The first stage would consist of detailing the interpretive approaches adopted in different international legal regimes. This would provide the basis for the second stage, in which the Study Group would explore and identify the reasons for the differences across ‘regimes’.
- The Co-Rapporteur suggested that members may find it instructive to consult R.S. Summers & D.N. MacCormick (eds), *Interpreting Statutes* (Dartmouth 1991) as an example of a previous comparative project that examined interpretation across different jurisdictions.

#### **V. CONCLUSION & NEXT STEPS**

On the basis of the *ILA Study Group Road Map*, the inaugural meeting in Athens and the comments of the members, there was consensus among the members of the Study Group that the scope of potential topics for the Study Group’s attention was currently too broad. Finalization of the research agenda and the division of labour was deferred to the

Study Group's meeting in Johannesburg. The Closed Session in Johannesburg should be used to determine the direction of the Study Group's work in light of the Preliminary Report and the comments of the members. Inspiration would also be drawn from the comments of the ILA members present during the Open Session.

In terms of substantive conclusions, some provisional agreements and arrangements have arisen prior to the meeting in Johannesburg. It was agreed that the first part of the *Road Map* would be revised to outline a brief history of treaty interpretation in order to provide context for the subsequent sections. All members expressed willingness to contribute to the work of the Study Group. In their individual comments, some members indicated a preference for specific topics. Once the methodological approach of the Study Group has been determined - in particular in relation to topic 3 of the *Road Map* - allocation of research and output responsibilities will be circulated to the members.

Finally, members were in agreement that the output of the Study Group's research will take not only the form of a final report, but also of an edited volume.